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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 609

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 1229, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on November 20, 1952 (R. 265-270), which set aside an order of the Board, dismissing in part a complaint against Jefferson Standard Broadcasting Company, and remanded the case to the Board for further proceedings not inconsistent with the opinion of that Court.

OPINIONS BELOW

The opinion of the court below (R. 265-270) has not yet been officially reported. The findings of

fact, conclusions of law, and order of the Board (R. 60, 177, 191-199, 985-999, 1001-1004), are reported at 94 NLRB 1507.

JURISDICTION

The judgment of the court below (R. 270) was entered on November 20, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that the distribution by employees of a pamphlet disparaging the quality of their employer's television programs with the undisclosed object of inducing the employer to come to terms in contract negotiations was not the kind of activity entitled to the protection of Sections 7 and 8 of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 22-26.

STATEMENT

Upon charges filed by petitioner (hereinafter called the "Union"), the General Counsel for the Board issued a complaint alleging that the Jefferson Standard Broadcasting Company (hereinafter called "the Company") violated Sections 8 (a) (1), (3), and (5) of the National Labor Relations Act, as amended (R. 43-44). After the usual pro-

ceedings under Section 10 of the Act, the Board, on June 26, 1951, issued an order (R. 10) dismissing that part of the complaint which alleged that the Company discharged nine employees in violation of Section 8 (a) (3) and unlawfully refused to bargain with the Union in violation of Section 8 (a) (5). The pertinent facts upon which the Board's order are predicated may be summarized as follows:

I. The Facts

In December 1948, the Union was the collective bargaining representative of the technicians of the Company, an operator of a radio and television service (R. 46, 47, 73; 95, 134, 177). During that month, the Union and the Company began to negotiate for a collective bargaining contract (R. 14, 47; 94-95, 135). The negotiations continued until July 8, 1949, when the parties reached an impasse regarding the terms of a clause providing for the arbitration of discharges (R. 14, 49; 95, 115-116, 136, 217). The following day, July 9, 1949, the Union began to picket the Company's downtown place of business in Charlotte, North Carolina, without, however, calling a strike (R. 14, 50; 96-97, 100). By placards and handbills, the pickets appealed to the public, in the name of the Union, to support the employees' stand in the contract dispute (R. 14-15, 50-51; 97, 127-132, 241-251).

When these methods failed, the Union on August 24 commenced the distribution of a handbill which condemned the Company for offering inferior television service (R. 15-17, 51-52; 96-97, 241-251).

Unlike the preceding leaflets, the new leaflet made no reference to the pending labor dispute, and did not bear the name of the Union, being signed simply "WBTV Technicians" (*ibid.*). The text of the handbill, which is referred to in the record as the "second-class" handbill, is as follows (R. 15; 51-52; 97, 244):

> IS CHARLOTTE A SECOND-CLASS CITY?
>
> You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBTV. Have you seen one of their television programs lately? Did you know that all the programs presented over WBTV are on film and may be from one day to five years old. There are no local programs presented by WBTV. You cannot receive the local baseball games, football games, or other local events because WBTV does not have the proper equipment to make these pickups. Cities like New York, Boston, Philadelphia, Washington receive such programs nightly. Why doesn't the Jefferson Standard Broadcasting Company purchase the needed equipment to bring you the same type of programs enjoyed by other leading American cities? Could it be that they consider Charlotte a second-class community and only entitled to the pictures now being presented to them?
>
> WBTV TECHNICIANS

The handbill was distributed widely throughout the business section of Charlotte, not only at the

picket line, but elsewhere, in places such as busses, barber shops, and restaurants (R. 15, 53; 148, 150, 151, 157, 171, 189, 194, 197). Some of them were sent to businessmen by mail (R. 149, 157, 182, 184). In all, 5,000 copies were distributed from August 24 through September 2, 1949 (R. 52-53; 101, 157-158).

The second-class handbill, like all the previous handbills, was drafted and approved by the Union's officers and executive committee (R. 15, 52; 103-104). The distribution of the handbill occasioned widespread comment in the community and caused the Company to apprehend a loss of advertising revenue due to dissatisfaction with its television broadcasts (R. 16, 53; 137-139, 149, 157, 160-161, 172, 179, 180, 181, 182, 187, 192). Television equipment distributors and dealers became "very concerned" about the effect of the handbill on their business and expressed their concern to the Company personally, by mail, and by telephone (R. 16, 53; 137-138, 172, 180, 183, 185, 187, 191, 192). There was, in fact, an unexpected drop in sales of television receiving equipment during the month following distribution of the handbill (R. 60, n. 10; 183, 186, 187, 191), and the Company operated "in the red" during that period (R. 53; 143-144).

In order to protect the business from further injury, the Company, by letters dated September 3, 1949, discharged the nine employees involved in this proceeding (R. 54; 92, 162, 224-225), all of whom the Board found, either distributed, or were responsible for the distribution of the "second-class"

leaflet (R. 18, 52, 98, 101-105, 106, 133).[1] Pointing out in these letters that the Company had not objected to, or interfered with, the distribution of any literature prior to the "second-class" handbill because of its belief that the employees were merely "trying to make the public believe that your employer is unfair to you," the Company declared (R. 54; 92, 224-225):

> Now, however, you have turned from trying to persuade the public that we are unfair *to you* and are trying to persuade the public that we give inferior service *to them*. While we are struggling to expand into and develop a new field, and incidentally losing large sums of money in the process, you are busy trying to turn customers and the public against us in every possible way, even handing out leaflets on the public streets advertising that our operations are "second-class," and endeavoring in various ways to hamper and totally destroy our business. Certainly we are not required by law or common sense to keep you in our employment and pay you a substantial salary while you thus do your best to tear down and bankrupt our business.

As already stated, *supra*, p. 3, the Company and the Union reached an impasse in the negotiations on July 8, 1949, prior to the commencement of the

[1] The Board found that a tenth employee, whom the Company also discharged, did not in fact distribute, and was not responsible for the distribution of the handbill and, accordingly, that his dismissal by the Company was not justified (R. 18-19; 102, 104).

picketing. On September 6, 1949, three days after the discharge of the employees heretofore discussed, the Union requested the Company to reinstate these employees, submit their cases to arbitration, and "upon settlement of the discharge question" to resume collective bargaining (R. 19-20, 75; 100, 231). The Company rejected the Union's proposals, indicating that it was not willing to resume negotiations on the basis proposed by the Union since the employees were discharged "for just and compelling reason and we are not willing to have them back in our employment" (R. 20, 75-76; 100, 232).

About six months later, in March 1950, and again in May 1950, the Union repeated its request to resume negotiations (R. 20, 23, 76; 202-203, 209, 210-214, 255). On May 13, 1950, the Company rejected the Union's request on the ground that because of the discharge of the employees who had distributed the "second-class" handbills, the Union no longer represented a majority of the employees in the appropriate unit (R. 23, 73; 204, 205, 207, 258).

II. The Board's Decision

Upon the foregoing facts, a majority of the Board (four of the five members) concluded that the Company had not violated Section 8 (a) (3) and (1) of the Act by discharging the nine employees involved in this proceeding for distributing the "second-class" handbill (R. 13-17). The Board found that although the employees' ultimate purpose in distributing the handbill was to wrest concessions from the Company with respect to the

terms of their employment, and was therefore lawful, the means utilized by them were not protected concerted activities within the meaning of the Act. The Board stated that the employees' ultimate purpose

> . . . was undisclosed; the employees purported to speak as experts, in the interest of consumers and the public at large. They did not indicate that they sought to secure any benefit for themselves, *as employees*, by casting discredit upon their employer.
>
> In our judgment, these tactics, in the circumstances of this case, were hardly less "indefensible" than acts of physical sabotage. The Board has held, and we reaffirm, that the Act protects employees against employer reprisal when they speak freely "on organizational matters" (to borrow the Trial Examiner's expression), and in one way or another denounce their employer for his conduct of labor relations or affairs germane to the employment relationship. Moreover, employees acting in concert may exhort consumers to refrain from purchasing their employer's product unless and until he alters his labor policy or practices. But this is a different case. Here, the subject matter of the employees' verbal attack upon the employer was not related to their interests *as employees*. And the gist of their appeal to the public was that the employer ought to be boycotted because he offered a shoddy product to the consuming public—not because he was "unfair" to the employees who worked on that product. [Footnotes omitted.]

Accordingly, the Board concluded that the activity was beyond the scope of statutory protection and the discharge of the employees who engaged in it was not a violation of Section 8 (a) (3). The Board further concluded that since the discharges were lawful, the loss of the Union's majority status, as a result of such discharges, justified the Company's subsequent refusal to bargain (R. 23).[2] The Board therefore dismissed the complaint insofar as it alleged that the Company discharged the nine employees in question and refused to bargain collectively with the Union, in violation of the Act.

III. The Court's Decision

The Union petitioned the court below to review and modify the Board's order insofar as it dismissed the allegations of the complaint as noted above. The court below, without disturbing any of the Board's findings of fact, concluded that the standard of "indefensibility" applied by the Board in determining whether the employees' activities were protected by Section 7 of the Act, was improper (R. 268-269). The court held that the correct criterion for determining whether a concerted activity came within the protection of the Act is whether it is "lawful" or "unlawful" (R. 267-

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[2] Member Murdock dissented from the majority's views, agreeing with the trial examiner that the employees' activities were protected by Section 7 of the Act (R. 28-37, 59-62). Like the court below, Mr. Murdock stated that concerted activity such as here involved loses its protection only if it is "unlawful" (R. 32). In view of their conclusion that the distribution of the handbill was not protected because it did not relate to the employer-employee relationship, the majority did not reach the question whether the activity was "unlawful" (R. 17).

270). The court stated that "Protection under Sec. 7 . . . . is withdrawn only from those concerted activities which contravene either (a) specific provisions or basic policies of the Act or of related federal statutes, or (b) specific rules of other federal or local law that is not incompatible with the Board's governing statute" (R. 267). Accordingly, the court set aside the Board's order insofar as it dismissed the complaint and remanded the case to the Board "for further proceedings not inconsistent with [the court's] opinion" (R. 270).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that all concerted activities undertaken in the course of a labor dispute are entitled to the protection of the Act, so long as such activities do not violate any federal or state statute, even though the subject matter of such activities is not related to the labor dispute or the employer-employee relationship.

2. In failing to affirm the order of the Board insofar as it dismissed the complaint against the employer.

REASONS FOR GRANTING THE WRIT

1. Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." While agreeing with the Board that not all concerted activities are protected by the Act, the court below held that all such activities are entitled to protection unless the object thereof, or the means employed to achieve such object, are affirmatively made unlawful by federal or local law.

The holding thus casts a mantle of protection on all collective action not in itself unlawful to achieve an objective in a labor dispute, even though the subject matter of such action is not related to the employees' interests as employees and is foreign to the employer-employee relationship. The issue is recurring and is one of fundamental importance in the operation of the statute. In the present state of the law, neither employer nor employees can move with assurance when any unorthodox type of activity is involved in a labor dispute. The employees risk discharge; the employer may be found guilty of an unfair labor practice with liability for back pay. Because of the manifest importance of the question and because, as we show below, the holding below is in conflict with decisions of this Court and courts of appeals, the issue should be authoritatively resolved.

2. The test for determining whether a concerted activity comes within the protection of the Act was enunciated by the Board more than thirteen years ago in *Harnischfeger Corp.*, 9 NLRB 676. The Board there stated (at p. 686):

> Section 7 of the Act expressly guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. We do not interpret this to mean that it is unlawful for an employer to discharge an employee for *any* activity sanctioned by a union or otherwise in the nature of collective activity. The question before us is, we think, whether this particular activity was so indefensible, under the circumstances, as to warrant the respond-

ent [employer], under the Act, in discharging the [employees] for this type of union activity.

In determining whether concerted activity is "so indefensible, under the circumstances," as to warrant its withdrawal from the protection of the Act, the Board has taken into account not only the nature of the particular activity but also its impact on the legitimate interests of the employer. See, *e.g., Carnegie-Illinois Steel Corp.*, 84 NLRB 851, 852-853, enforced, *sub nom. Albrecht* v. *National Labor Relations Board*, 181 F. 2d 652 (C.A. 7) (involving failure to protect plant from serious injury). While the legality or illegality of the concerted activity has been found to be significant, and oftentimes controlling (see *e.g., American News Co.*, 55 NLRB 1302) (strike for wage increase not authorized by War Labor Board), it has by no means been determinative in all situations. In some cases, the collective action, while in itself lawful, was found to be wholly unrelated to legitimate employee interests. See, *e.g., Fontaine Converting Works*, 77 NLRB 1386, 1387-1388 (strike over demotion of a foreman). In others, the benefits which might reasonably accrue to the employees from the particular activity were found too trivial in comparison to the detriment which would flow to the employer from such activity. *Carnegie-Illinois Steel Corp.*, 84 NLRB 851, 852-853, enforced *sub nom. Albrecht* v. *National Labor Relations Board*, 181 F. 2d 652 (C.A. 7); *Elk Lumber Co.*, 91 NLRB 333, 336-338 (involving a slowdown). Accordingly, in such cases, the Board, in

conformity with "the purpose and policy" of the Act "to prescribe the legitimate rights of both employees and employers" in their "relations with each other" (Sec. 1(b) of the Act), has held that the concerted activity, although not unlawful in itself, was not entitled to the protection of the Act. These decisions accord with the principle laid down by this Court in *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U. S. 793, 798, and later reaffirmed in *National Labor Relations Board* v. *Stowe Spinning Company*, 336 U. S. 226, 231, that "Like so many others, these rights [to engage in concerted activities] are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society." See also *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 253.

3. Recently, in *United Automobile Workers* v. *Wisconsin Board*, 336 U. S. 245, this Court expressly approved the test laid down by the Board in the *Harnischfeger* case (9 N.L.R.B. 676) regarding the nature of the concerted activities protected by the Act. In the *United Automobile Workers* case, a union and its members were enjoined under a state statute from engaging in a series of short, unannounced, and intermittent work stoppages, the object of which was to force the employer to grant bargaining concessions. This Court, in rejecting the union's contention that such stoppages were "federally protected concerted ac-

tivities" and therefore beyond the power of the state to regulate, concluded that the conduct in question "was neither forbidden by federal statute nor was it legalized and approved thereby" (336 U. S. at pp. 255, 264-265). In reaching its conclusion, the Court quoted the criterion for determining whether a concerted activity is protected or unprotected as set forth in the *Harnischfeger* case (*supra*, pp. 11-12), and later reiterated in *Armour & Co.*, 25 NLRB 989, and then declared (336 U. S. at pp. 256-257):

> In view of that statement, the facts of the present case do not bring it within the protection of the Act as administered by the Board. * * * we do not find any fixed Board policy to apply the Act to such facts as we have here. The quoted statement from the Board's two opinions indicates lack of belief that it was creating any such rule.
>
> However, in no event could the Board adopt such a binding practice as to the scope of § 7 in the light of the construction, with which we agree, given to § 7 by the Courts of Appeals, authorized to review Board orders. In similar cases they have denied *comparable work stoppages* the protection of that section. *C. G. Conn. Ltd.* v. *Labor Board*, 108 F. 2d 390; *Labor Board* v. *Condenser Corp.*, 128 F. 2d 67; *Home Beneficial Life Ins. Co.* v. *Labor Board* 159 F. 2d 280; and see *Labor Board* v. *Draper Corp.*, 145 F. 2d 199; *Labor Board* v. *Indiana Desk Co.*, 149 F. 2d 987. To hold that the alleged fixed Board interpretation has irrevocably labeled all concerted activities "pro-

tected" would be in the teeth of the Board's own language and would deny any effect to the Courts of Appeals' decisions. The latter decisions and our own, *Labor Board* v. *Fansteel Corp.*, 306 U. S. 240; *Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31; *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740; and see *Hotel & Restaurant Employees' Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 437, clearly interdict any rule by the Board that every type of concerted activity is beyond the reach of the states' adjudicatory machinery. [Italics added.]

The assertion of the court below that this Court in the *United Automobile Workers* case was merely "thinking in terms of 'lawful' and 'unlawful' as the underlying criterion for the application of protection under the Act" and, therefore, that this Court "gave no broader meaning to 'indefensible' than unlawful" (R. 268-269, n. 17) is inaccurate. This Court found that the concerted work stoppages in the *United Automobile Workers* case were "indefensible" not because they violated any state or federal statute, or other law, but because "in view" of the criterion set forth in the *Harnischfeger* case, "the facts of the * * * case [did] not bring it within the protection of the Act as administered by the Board" (336 U. S. at p. 256). It was only because the conduct was not protected or forbidden by the National Labor Relations Act that this Court held that the State of Wisconsin was free to regulate it and illegalize it.

Moreover, in reaching its conclusion that the activities in the *United Automobile Workers* case were outside of the protection of the Act, this Court relied on such cases as *C. G. Conn, Ltd.* v. *National Labor Relations Board,* 108 F. 2d 390 (C.A. 7); *National Labor Relations Board* v. *Condenser Corp.,* 128 F. 2d 67 (C.A. 3); *Home Beneficial Life Ins. Co.* v. *National Labor Relations Board,* 159 F. 2d 280 (C.A. 4) "with which," the Court pointedly stated (336 U. S. at p. 257), "we agree." None of these cases involved concerted activities illegalized by federal or state statutes.[3] Yet the court in each case found the concerted activity, even though related to conditions and terms of employment, to be outside the protection of the Act. Thus those cases are inconsistent with the holding of the court below. Moreover, the very fact that this Court cited these cases in *pari passu* with such cases as *National Labor Relations Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, and *Southern S. S. Co.* v. *National Labor Relations Board,* 316 U. S. 31, both of which did involve illegal conduct, indicates that the Court was not merely thinking in terms of a distinction between "unlawful" and otherwise improper conduct.

That this Court did not intend to draw such a

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[3] In the *Conn* case, the employees concertedly refused to work overtime until their demands were met by management. In the *Condenser* case, they stopped work in the middle of the day to press grievances although the employer promised to discuss these grievances at the end of the day. In the *Home Beneficial* case, the employees, insurance agents, concertedly refused to abide by the employer's rule to report to the company's office each morning before starting work.

distinction in the *United Automobile Workers* case is, we think, conclusively demonstrated by the Court's reliance on the legislative history of Section 7 of the Act which clearly established Congressional approval of the Board's construction that the section excludes from the protection of the Act not only "unlawful" concerted activities but also "other improper conduct" (336 U. S. at pp. 255-264). As explained by the Court (336 U. S. at pp. 260-263), the House which considered the 1947 amendments to the Wagner Act, originally passed a provision expressly withdrawing statutory protection from certain enumerated concerted activities.[4] The House Conference committee succeeded in persuading the House to eliminate this provision and to accept the text of Section 7 as proposed by the Senate on the grounds (1) that "the courts have firmly established the rule that under the existing provisions of section 7 * * * employees are not given any right to engage in unlawful or *other improper conduct*"; (2) that "in its most recent decisions the Board has been consistently applying the principles established by the courts"; and (3) that "there was real concern that the inclusion of such a provision might have a limiting effect and make *improper* conduct not specifically mentioned subject to the protection of the act."[5] In the face of this evidence of Congressional accept-

[4] H.R. 3020, Sec. 12, in Legislative History of the Labor Management Relations Act, 1947, pp. 204-207

[5] H. Rep. No. 510, 80th Cong., 1st Sess., p. 33, in Legislative History of the Labor Management Relations Act, 1947, pp. 542-544. (Italics supplied.)

ance and adoption of the "unlawful and other improper conduct" test,[6] evidence which the Court itself stressed, it is clear that contrary to the assertion of the court below, this Court in the *United Automobile Workers* case did not equate the term "indefensibility" with "unlawfulness."

4. The decision below is in conflict not only with this Court's *United Automobile Workers* decision and cases cited therein (*supra*, pp. 13-15), but also with *Maryland Drydock Co.* v. *National Labor Relations Board*, 183 F. 2d 538 (C.A. 4) (circulation of literature "insulting to those in charge of management and destructive of discipline"); *Albrecht* v. *National Labor Relations Board*, 181 F. 2d 652 (C.A. 7) (involving a concerted refusal of supervisors, employees under the controlling Wagner Act, to perform the work of strikers to protect the plant); *Joanna Cotton Mills Co.* v. *National Labor Relations Board*, 176 F. 2d 749 (C.A. 4) (circulation of petition calling for removal of supervisory employee); *National Labor Relations Board* v. *Reynolds International Pen Co.*, 162 F. 2d 680 (C.A. 7) (concerted walkout to protest promotion of foreman); and *National Labor Relations Board* v. *Montgomery Ward & Co.*, 157 F. 2d 486 (C.A. 8) (refusal to process goods ordered by struck plant). In none of these cases was the legality or illegality of the concerted activity by itself determinative of its

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[6] Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366; *Brewster* v. *Gage*, 280 U.S. 327, 337.

protected or non-protected character under the Act. The decision in each case turned on the fact that the employees' concerted activities, considered in the light of all the circumstances, including the nature of their acts and the impact of the conduct on the employers' legitimate interests, were unjustifiable. Each case involved an appropriate adjustment of the "conflicts and interests between employer and employee." The *Albrecht* case, 181 F. 2d at p. 659.[7]

5. The facts found by the Board, and left undisturbed by the court below, establish that the employees in the instant case deliberately undertook to alienate their employer's customers by disparaging the quality of its product. The handbills through which the employees' campaign of disparagement was conducted concealed from the public the true objective of their conduct, namely to force the employer to capitulate to the Union's bargaining demands, which the employer steadfastly but in good faith refused during the negotiations. The handbills made no reference whatever to any employment grievances or demands, not

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[7] The court below pointed to language in *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolates Company*, 130 F. 2d 503, 506 (C. A. 2d), and *The Hoover Company*, 90 N. L. R. B. 1614, 1621 (R. 267-268). However, on their facts, these cases do not support the decision. In the *Peter Cailler* case, the basic question was whether concerted action to support an agricultural cooperative was protected under the Act. In *The Hoover Company* case, a union boycott of the company's products was undertaken to aid in resolving a labor dispute. In both cases, the action was openly and avowedly union action, undertaken as such. In the present case, one of the important elements was the failure to disclose that the criticism of the employer's programs was union activity.

even to the pendency of a labor dispute. And the employees signed their pamphlets in the name of the "technicians," thus ostensibly holding themselves out as experts on the employer's business and advising the public at large as to the technical quality of its product. In sum, although the ultimate purpose of the employees was to extract a concession from the employer with respect to the terms of their employment, the gist of their appeal to the public was that the employer should be boycotted because he offered an inferior product to the public. The attack upon the employer was not related to the employees' interests as employees.

In these circumstances the Board, weighing the legitimate interests of the employer and the employees could, we submit, conclude, as it did, that the distribution of the handbills had such deleterious impact upon the employer's legitimate interest to be free from such an attack upon his product as to make the technique utilized by the employees to achieve their ends not permissible. "In such cases it is the function of the Board to weigh the conflicts which arise from time to time out of the exercise of [the employees' statutory] rights and to determine in each case whether the interest of the employees or the interest of the employers should be held paramount." *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 816 (C. A. 7). Cf. *e.g.*, *Albrecht* v. *National Labor Relations Board*, 181 F. 2d 652 (C. A. 7); *C. G. Conn, Ltd.* v. *National Labor Relations Board*, 108 F. 2d 390 (C. A. 7); *National Labor Relations*

Board v. *Condenser Corp.*, 128 F. 2d 67 (C. A. 3); *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. 2d 280 (C. A. 4), all cited with express approval in the *U. A. W.* case, *supra*, 336 U. S., at pp. 256-257.

CONCLUSION

The issues presented are of substantial importance in the administration of the Act, and the decision below conflicts in principle and result with the decisions of this Court and courts of appeals. It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Solicitor General.

GEORGE J. BOTT,
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FEBRUARY, 1953.

APPENDIX

The relevant provision of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. V, 141, *et seq.*), is set forth as follows:

Short Title and Declaration of Policy

Section 1. * * *

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

* * *

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer——

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony

upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the

unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *